

COMMENTARY

CHANGING CONCEPTIONS OF JUDICIAL REVIEW: THE
EVOLUTION OF CONSTITUTIONAL THEORY
IN THE STATES, 1790-1860 †

WILLIAM E. NELSON ††

Any complete study of the history of the Supreme Court of the United States must inevitably raise questions about the origins of the peculiarly American doctrine of judicial review of legislation. The first two volumes to appear in the projected eleven-volume *History of the Supreme Court of the United States* funded by the Oliver Wendell Holmes Devise¹ are no exception. Both Julius Goebel's *Antecedents and Beginnings to 1801* and Charles Fairman's *Reconstruction and Reunion, 1864-88* are remarkably thorough works of scholarship, and each contains important material on the topic of judicial review.

The study of early traditions of judicial control over legislation is a prominent theme in Professor Goebel's opening volume of the Court history.² After tracing judicial review back to early English enforcement of provisions in municipal charters prohibiting ordinances contrary to the common law, Goebel discusses at length the 1728 case of *Winthrop v. Lechemere*,³ which held that colonial assemblies could not enact laws inconsistent with charter provisions affirming the primacy of the common law. To the English, for whom colonies were the legal equivalent of municipal corporations, the decision in *Winthrop* broke no new legal ground, but to Americans the case was a disturbing chal-

† 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, BY JULIUS GOEBEL, JR. New York: Macmillan Co., 1971. Pp. xxv, 864. \$30.00. 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88: PART ONE, BY CHARLES FAIRMAN. New York: Macmillan Co., 1971. Pp. xx, 1540. \$30.00.

†† Assistant Professor of Law, University of Pennsylvania. A.B. 1962, Hamilton College; LL.B. 1965, New York University; Ph.D. 1971, Harvard University. Member, New York Bar.

¹ The Oliver Wendell Holmes Devise Fund was established by an Enabling Act of Congress in 1955 to prepare and publish a history of the Supreme Court. The appropriation for the Fund came from Holmes' bequest of his residuary estate (valued at approximately \$263,000) to the United States of America twenty years earlier. See Mumford, *Foreword* to J. GOEBEL, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at xi (1971) [hereinafter cited as GOEBEL].

² See GOEBEL, *supra* note 1, at 50-95, 125-42, 589-92, 704-07, 778-84. For further discussions of this idea see *id.* 109-18 (selective retention of English law after the Declaration of Independence); 204-36 (the Constitutional Convention Debates); 304-23 (Hamilton's defense of the judiciary in *The Federalist*); 645-51 (the planned constitutional attacks on the Sedition Acts).

³ British Privy Council, 1728 (unreported), in 1 J. THAYER, CASES ON CONSTITUTIONAL LAW 34 (1895). See GOEBEL, *supra* note 1, at 73-76. For a South Carolina case denying to colonial courts the power to invalidate colonial legislation contrary to the common law, see *Williams v. Watson's Executors*, S.C.C.P., Nov. 1759, in J. SMITH, DEVELOPMENT OF LEGAL INSTITUTIONS 452 (1965).

lence to their legislatures' supremacy. Four decades later, however, as they searched for ways to limit the supremacy of Parliament, Americans found judicial review more appealing, and they themselves took further steps toward it, until by the outbreak of the War of Independence "a distinctly native doctrine of [judicial] control over legislation" had begun to emerge.⁴

As Americans during the 1770's and 1780's established their new governments and framed their new constitutions, the doctrine of judicial review matured and gained increasing acceptance. Goebel discusses five leading cases in which state courts confronted the issue of judicial review in the 1780's;⁵ he concludes that in four of the cases the courts ruled they had power to invalidate unconstitutional legislation, while in the fifth a New York court effectively struck down a statute under the guise of interpretation. There were other cases in Massachusetts⁶ and New Hampshire,⁷ holding legislative acts unconstitutional and in South Carolina narrowly circumscribing some 1787 legislation.⁸ Goebel maintains, moreover, that judicial review was widely approved both at the federal constitutional convention and in the state ratifying conventions. He points to numerous statements⁹ arguing or assuming that the Supreme Court would exercise the power of review and observes "that the antifederalists, who were quick to pounce on anything that could be converted into a reproach of the proposed system, [did] not immediately [join] issue";¹⁰ his view is that the doctrine of judicial review was "preached . . . [during the 1780's] apparently without protest."¹¹

⁴ GOEBEL, *supra* note 1, at 93.

⁵ *Id.* 125-42; Rutgers v. Waddington (N.Y.C. Mayor's Ct. 1784), in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 302 (R. Morris ed. 1935); Den *ex dem.* Bayard v. Singleton, 1 Martin 42 (N.C. 1787); J. VARNUM, THE CASE, TREVETT AGAINST WEEDEN (1787) (R.I.); Cases of the Judges, 8 Va. (4 Call.) 135 (1788); Commonwealth v. Caton, 8 Va. (4 Call.) 5 (1782).

⁶ On the basis of a 1788 letter from J. B. Cutting to Thomas Jefferson, the Massachusetts case was initially identified as Brattle v. Hinckley, Supreme Judicial Court, Worcester, Sept. Term, 1786. The court in that case, however, did not hold a legislative act unconstitutional, and none of the surviving records of the case indicate whether the court asserted its power of judicial review. See Goodell, *An Early Constitutional Case in Massachusetts*, 7 HARV. L. REV. 415 (1894). Professor Crosskey has accordingly described the Massachusetts case as one "which seems never to have occurred." 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 961-62 (1953) [hereinafter cited as CROSSKEY]. However, in Goddard v. Goddard, Supreme Judicial Court, Suffolk, Feb. Term, 1789, the highest court of Massachusetts did, in fact, hold unconstitutional a legislative resolve reinstating a previously decided action on the court's docket. See generally W. Nelson, The Americanization of the Common Law During the Revolutionary Era 258 n.72 (unpublished Ph.D. dissertation, Harvard University, 1971) [hereinafter cited as Nelson].

⁷ There were at least two unreported cases in New Hampshire in which the courts held void legislative acts changing the right to jury trial. These cases are discussed in CROSSKEY, *supra* note 6, at 968-71.

⁸ Ham v. M'Claws, 1 Bay 93 (S.C. 1789).

⁹ E.g., GOEBEL, *supra* note 1, at 209 (statements of Elbridge Gerry of Mass.); 227 (James Wilson of Pa.); 301-02 (Luther Martin of Md.); 313-14 (Alexander Hamilton of N.Y.); 381 (George Nicholas of Va.); 386 (Patrick Henry of Va.).

¹⁰ *Id.* 331.

¹¹ *Id.* 338.

Goebel somewhat overstates his case, however, for while there was substantial support for judicial review in the 1780's, there was also substantial opposition. Goebel himself calls attention to some of it. He takes note, for instance, of the "angry reaction"¹² of some of the state legislatures whose acts were invalidated, as well as of fears expressed both at the federal convention and during the ratification debates that a Court possessed of the power of review might become "by degrees the lawgiver."¹³ But Goebel ignores the opposition of many other men,¹⁴ most notably James Madison, who wrote that judicial invalidation of legislation would make "the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."¹⁵ In truth, judicial review was a question for which the nation as a whole had no final answer in the 1780's; it was, as James Monroe noted in 1788, an issue "calculated to create heats and animosities."¹⁶

Professor Goebel's volume ends immediately before *Marbury v. Madison*,¹⁷ the first decision¹⁸ in which the Supreme Court invalidated an act of Congress, and neither volume discusses *Scott v. Sandford*,¹⁹ the second such decision. But Professor Fairman's volume, which begins with the year 1864, demonstrates that, after the *Dred Scott* case, the Court began to strike down congressional legislation with regularity. Between 1864 and 1873, during the tenure of Chief Justice Salmon P. Chase, the doctrine of judicial review was firmly established, with the

¹² *Id.* 137.

¹³ *Id.* 238 (quoting John Dickinson in 2 THE RECORDS OF THE FEDERAL CONVENTION 299 (M. Farrand ed., rev. ed. 1937)). See generally *id.* 310.

¹⁴ See generally CROSSKEY, *supra* note 6, at 1010-25; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 302-05, 455 (1969) [hereinafter cited as WOOD].

¹⁵ *Madison's Observations on Jefferson's Draft of a Constitution for Virginia*, in 6 THE PAPERS OF THOMAS JEFFERSON 315 (J. Boyd ed. 1952).

¹⁶ Letter from James Monroe to James Madison, Nov. 22, 1788, in 1 THE WRITINGS OF JAMES MONROE 196 (S. Hamilton ed. 1898).

¹⁷ 5 U.S. (1 Cranch) 137 (1803).

¹⁸ Fairman counts *Marbury* as the second such decision. C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 [PART ONE] 52 n.83 (1971) [hereinafter cited as FAIRMAN]. He lists *United States v. Yale Todd* (1794) as the first case. The decision in *Todd* was not reported by Alexander Dallas, the Supreme Court's first reporter, but was discussed in a note in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851). Goebel does not discuss the case in his volume except in passing, when he lists some examples of court costs in the Supreme Court. GOEBEL, *supra* note 1, at 708.

Charles Warren discusses the case in 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 81-82 (rev. ed. 1926) [hereinafter cited as WARREN]. He points out that several of the Supreme Court Justices suggested, while sitting as circuit judges, that the act of Congress involved was unconstitutional. Two of the opinions of the Justices on circuit are reported in a note to *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.a. (1792). When the full Supreme Court finally reviewed the Act in *Todd*, it "found it unnecessary to pass upon the constitutionality of the Act," because "it held that the construction and theory of the Act adopted . . . [below] was untenable." WARREN, *supra*, at 81.

¹⁹ 60 U.S. (19 How.) 393 (1857).

Court invalidating federal statutes in at least eight cases,²⁰ including *Hepburn v. Griswold*,²¹ the first of the Legal Tender Cases and one of the more important cases in American constitutional history. The doctrine remained prominent during the next six decades as the Court held some sixty additional acts of Congress unconstitutional.²²

Taken together, the Goebel and Fairman volumes of the Supreme Court history therefore indicate that judicial review became an unchallenged dogma of American constitutional law sometime between the 1780's and 1860's. But neither volume even asks the questions of when and why this development took place. Perhaps those questions are outside the proper scope of a history of the Court, for the Justices invalidated acts of Congress on only two occasions between 1790 and 1860—in *Marbury* and in *Dred Scott*—and accordingly, they have left historians with little material with which to address the questions. Nonetheless, the questions are important ones, and answers should be sought, although in sources other than the Supreme Court's records.

State cases passing upon the validity of state legislation under state constitutions offer a promising, although not fully complete source. They suggest that by 1820 the doctrine of judicial review had attained general acceptance. By then eleven of the original thirteen states were publishing reports of their cases, and the courts of ten of them had either invalidated acts of their legislatures or unequivocally asserted their right to do so.²³ Moreover, all five of the states admitted to the Union be-

²⁰ FAIRMAN, *supra* note 18, at 1426-34. The decisions were *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865) (part of the court of claims statute); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (test oath for attorneys); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160 (1868) (an act to settle land titles); *The Alicia*, 74 U.S. (7 Wall.) 571 (1869) (grant of original jurisdiction); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870) (Legal Tender Acts); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870) (act relating to internal affairs of the states); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870) (act providing for removal and retrial of state cases tried by juries); and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (part of the Abandoned and Captured Property Act).

Charles Warren lists two other Supreme Court cases during this period in which congressional legislation was held invalid. C. WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 308-10 (rev. ed. 1935). These are *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (federal income tax statute held not applicable to state judge), and *United States v. Baltimore & O.R.R.*, 84 U.S. (17 Wall.) 322 (1873) (tax on railroad bonds' interest). Fairman concludes that these cases did not hold the acts of Congress invalid, but merely that it would be unconstitutional to apply the acts to the facts then before the Court. FAIRMAN, *supra*, at 1435-36.

²¹ 75 U.S. (8 Wall.) 603 (1870).

²² See C. WARREN, *supra* note 20, at 304-39.

²³ *Grimball v. Ross*, T. Charl. 175, 178 (Ga. 1808) (dictum); *Whittington v. Polk*, 1 Harr. & J. 236 (Md. 1802); *Holden v. James*, 11 Mass. 396 (1814); *Merrill v. Sherburne*, 1 N.H. 199 (1818); *State v. Parkhurst*, 9 N.J.L. 427 (Sup. Ct. 1802); *Gardner v. Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816); *Dash v. VanKleeck*, 7 Johns. 477, 492 (N.Y. 1811) (dictum); *Jackson v. Griswold*, 5 Johns. 139 (N.Y. 1809) (by implication); *Den ex dem. Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805); *Ogden v. Witherspoon*, 2 Haywood 404 (N.C. 1802); *State v. —*, 2 N.C. 28, 29-30 (1794) (dictum); *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808); *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799); *Austin v. University of Pa.*, 1 Yeates 260 (Pa. 1793); *White v. Kendrick*, 1 Brev. 469 (S.C. 1805); *Lindsay v. Commissioners*, 2 Bay 38, 61-62 (S.C. 1796) (dictum); *Kamper v. Hawkins*, 1 Brock.

tween 1790 and 1815 had accepted judicial review by 1820,²⁴ while the four states admitted between 1815 and 1819 all accepted the doctrine in cases published in the first two volumes of their reports.²⁵ By 1820, in short, the principle of judicial review was "well established by the great mass of opinion, at the bar, on the bench and in the legislative assemblies of the United States."²⁶

As they accepted the doctrine, judges and lawyers also articulated a rationale for it—a rationale that was continually reiterated in opinions in judicial review cases. The premise of the rationale was a novel American conception of sovereignty that had developed during the Revolutionary Era's debates. Americans rejected the traditional British view that the legislature possessed complete sovereignty and argued instead that sovereignty lay with the people,²⁷ who by a constitution delegated limited power to the legislature.²⁸ Legislators were mere "servants of the people,"²⁹ and a constitution, "the commission from

& H. 20 (Va. 1793); *Turner v. Turner*, 8 Va. (4 Call.) 234 (1792). See generally *Report of the Committee Upon the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law*, 38 N.Y. STATE BAR ASS'N PROCEEDINGS 230 (1915). This report not only covers these early state cases, but also surveys international attitudes at that time on the subject.

Only Connecticut had failed prior to 1820 to accept judicial review, but its failure stemmed at least in part from the continued use of its colonial charter as a constitution—a charter which gave extensive powers to the legislature. Only two cases challenging Connecticut legislation before 1820 on state constitutional grounds are known. One was *Symsbury v. Bidwell*, 1 Kirby 444 (Conn. 1785), where it appears, however, that the court did not invalidate the legislation on modern constitutional grounds. See *CROSSKEY*, *supra* note 6, at 961. See also *Thorne, Dr. Bonham's Case*, 54 L.Q. REV. 543 (1938).

The other case was *Hamilton v. Hempsted*, 3 Day 332, 338 (Conn. 1809), which refused to invalidate a 1708 grant of a new trial, since the act was "conformable to the usage and practice of that period; for the general assembly then exercised extensive judicial power, especially in granting new trials." Connecticut adopted a new constitution in 1818, and by 1822 had accepted judicial review. See *Goshen v. Stonington*, 4 Conn. 209, 221 (1822).

Of course, Connecticut legislation had been subjected to federal constitutional scrutiny at an early date. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

²⁴ See *Enderman v. Ashby*, 2 Ky. (Myers) 53 (1801); *Stidger v. Rogers*, 2 Ky. 52 (1801); *Syndics of Brooks v. Weyman*, 3 Martin 9, 12 (La. 1813) (dictum); *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71 (E. Pollack ed. 1952); *Bristoe v. Evans*, 2 Tenn. 341, 345-46 (1815) (dictum); *Williams v. Register*, 3A Tenn. 213, 217 (1812) (dictum); *Dupy v. Wickwire*, 1 Chip. 237, 238-39 (Vt. 1814) (dictum).

²⁵ See *Lyon v. State Bank*, 1 Stew. 442, 467 (Ala. 1828) (by implication); *Ward v. Lewis*, 1 Stew. 26, 28 (Ala. 1827) (by implication); *Phoebe v. Jay*, 1 Ill. (Breese) 207, 210 (1828) (dictum); *Dawson v. Shaver*, 1 Blackf. 204, 206-07 (Ind. 1822) (dictum); *Runnels v. State*, 1 Miss. (Walker) 146 (1823).

²⁶ *Moore v. Houston*, 3 S. & R. 167, 178 (Pa. 1817).

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308, 311 (C.C. Pa. 1795); *Grimball v. Ross*, T. Charlt. 175, 176 (Ga. 1808); *Whittington v. Polk*, 1 Harr. & J. 236, 242 (Md. 1802); *Merrill v. Sherburne*, 1 N.H. 199, 201 (1818); *State v. Parkhurst*, 9 N.J.L. 427, 443 (Sup. Ct. 1802); *Cohen v. Hoff*, 2 Treadway 657, 658, 3 Brev. 500 (S.C. 1814); *Kamper v. Hawkins*, 1 Brock. & H. 20, 24, 28 (Va. 1793). See generally *WOOD*, *supra* note 14, at 292, 301-04, 454-63, 471-518, 552.

²⁸ THE FEDERALIST No. 78, at 491-94 (B. Wright ed. 1961) (A. Hamilton).

²⁹ *Kamper v. Hawkins*, 1 Brock. & H. 20, 53 (Va. 1793).

whence [they] . . . derive[d] their power.”³⁰ It “follow[ed], that any act in violation of the constitution, or infringing its provisions must be void, because the legislature, when they step beyond the bounds assigned them, act without authority, and their doings are no more than the doings of any other private man.”³¹ The judiciary, whose duty was “to expound *what the law is*,”³² simply “compared[d] the legislative act with the constitution;”³³ since the constitution clearly “[could not] be adjudged void,” the courts had no choice but to declare any “act which . . . [was] inconsistent with it . . . [to] be *no law*.”³⁴ For judges to do otherwise would be to violate their oaths³⁵ and to join with the legislature in violating the constitution.³⁶ Thus, judicial declarations of unconstitutionality were unavoidable and did not “suppose a superiority of the judicial to the legislative power,”³⁷ but only “that the power of the people is superior to both.”³⁸

The doctrine of judicial review, moreover, was not thought to authorize courts to “determine upon the equity, necessity, or usefulness of a law.”³⁹ No one doubted that courts should ignore considerations about the wisdom or expediency of a law when passing upon its validity; to weigh them “would amount to an express interfering with the legislative branch.”⁴⁰ On the contrary, everyone agreed that courts should

³⁰ *Cohen v. Hoff*, 2 Treadway 657, 658, 3 Brev. 500, 501 (S.C. 1814); *accord*, *Bristoe v. Evans*, 2 Tenn. 341, 346 (1815).

³¹ *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71, 73 (E. Pollack ed. 1952); *accord*, *State v. —*, 2 N.C. 28, 30 (1794).

³² *Kamper v. Hawkins*, 1 Brock. & H. 20, 78 (Va. 1793); *accord*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71, 72 (E. Pollack ed. 1952).

³³ *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71, 73 (E. Pollack ed. 1952). Judges of this period often saw no difference between interpreting and reconciling two statutes where they appeared to conflict and reconciling a statute and a constitutional provision. See *Whittington v. Polk*, 1 Harr. & J. 236, 244 (Md. 1802); *Emerick v. Harris*, 1 Binn. 416, 421 (Pa. 1808); *Kamper v. Hawkins*, 1 Brock. & H. 20, 31-32, 38 (Va. 1793); *THE FEDERALIST* No. 78, at 492-93 (B. Wright ed. 1961) (A. Hamilton).

³⁴ *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71, 74 (E. Pollack ed. 1952); *accord*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Whittington v. Polk*, 1 Harr. & J. 236, 242 (Md. 1802); *State v. —*, 2 N.C. 28, 29 (1794); *Bristoe v. Evans*, 2 Tenn. 341, 346 (1815); *Kamper v. Hawkins*, 1 Brock. & H. 20, 30-31 (Va. 1793).

³⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803); *State v. Parkhurst*, 9 N.J.L. 427, 445 (Sup. Ct. 1802); *Rutherford v. M'Faddon* (Ohio 1807), in OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823, at 71, 74 (E. Pollack ed. 1952); *Emerick v. Harris*, 1 Binn. 416, 420 (Pa. 1808).

³⁶ *Kamper v. Hawkins*, 1 Brock. & H. 20, 59-61 (Va. 1793).

³⁷ *THE FEDERALIST* No. 78, at 492 (B. Wright ed. 1961) (A. Hamilton); *accord*, *Beall v. Beall*, 8 Ga. 210, 218 (1850); *White v. Kendrick*, 1 Brev. 469, 473 n. (S.C. 1805); *Bates v. Kimball*, 2 Chip. 77, 81 (Vt. 1824).

³⁸ J. BAYARD, BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 123 (2d ed. 1834); *accord*, *Crane v. Meginnis*, 1 Gill & Johns. 463, 472 (Md. 1829); *Merrill v. Sherburne*, 1 N.H. 199, 201 (1818); *Den ex dem. Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58, 86 (1805); *Jones' Heirs v. Perry*, 18 Tenn. 59, 74 (1836).

³⁹ *Kamper v. Hawkins*, 1 Brock. & H. 20, 47 (Va. 1793).

⁴⁰ *Id.*

decide constitutional cases on the basis of "fixed principles . . . stamped with the seals of truth and authority."⁴¹ Their agreement was merely a corollary of an established tenet of late eighteenth-century jurisprudence that judges ought not to "pronounce a new law, but to maintain and expound the old one,"⁴² and, although that tenet was slowly breaking down in the early nineteenth century,⁴³ men remained convinced until the 1820's that judges could draw a line between "legal discretion" and "political discretion,"⁴⁴ between the exercise of "*judgment*" and the "exercise [of] *will*,"⁴⁵ and between "declaring what the law is, and . . . making a new law."⁴⁶ Judicial review, as it developed after the 1780's, was thought, in sum, only to give the people—a single, cohesive and indivisible body politic—protection against faithless legislators who betrayed the trust placed in them, and not to give judges authority to make law by resolving disputes between interest groups into which the people and their legislative representatives were divided.

This conception of judicial review had not matured in the 1780's, perhaps because it was inconsistent with a reality in which the courts in several cases took sides upon important social issues of the day that divided men into opposing political factions. One issue underlying state-wide political divisions of the 1780's was whether to permit former Tories to recover their property and their civil rights after the War of Independence had ended.⁴⁷ Legislatures in the 1780's adopted numerous acts discriminating against the Tories, and in three cases courts effectively invalidated three such acts;⁴⁸ in one of those cases, at least, the court's decision provoked a stormy legislative response.⁴⁹ A second divisive issue arose out of the economic dislocation of the post-war years, which had a particularly heavy impact upon debtor elements of society. Throughout the 1780's debtors sought and often obtained legislative aid in the form of tax relief, stay laws, and the issuance of paper money,⁵⁰ and the most controversial of all the judicial

⁴¹ *Grimball v. Ross*, T. Charlt. 175, 177 (Ga. 1808).

⁴² 1 W. BLACKSTONE, COMMENTARIES *69.

⁴³ See generally Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287 (D. Fleming & B. Bailyn eds. 1971) [hereinafter cited as Horwitz]; Nelson, *supra* note 6, at 149-54, 418-27.

⁴⁴ *United States v. The William*, 28 F. Cas. 614, 620 (No. 16,700) (D.C.D. Mass. 1808). See also cases cited note 33 *supra*.

⁴⁵ THE FEDERALIST No. 78, at 493 (B. Wright ed. 1961) (A. Hamilton) (emphasis in original).

⁴⁶ *Cases of the Judges*, 8 Va. (4 Call.) 135, 146 (1788).

⁴⁷ See M. JENSEN, THE NEW NATION 265-81 (1950) [hereinafter cited as JENSEN].

⁴⁸ *Rutgers v. Waddington* (N.Y.C. Mayor's Ct. 1784), in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 302 (R. Morris ed. 1935); *Den ex dem. Bayard v. Singleton*, 1 Martin 42 (N.C. 1787); *Ham v. M'Claws*, 1 Bay 93 (S.C. 1789).

⁴⁹ See GOEBEL, *supra* note 1, at 137; JENSEN, *supra* note 47, at 272; Wood, *supra* note 14, at 458-59.

⁵⁰ See JENSEN, *supra* note 47, at 302-26.

review cases of the decade was *Trevett v. Weeden*,⁵¹ holding Rhode Island's issuance of paper money unconstitutional. *Trevett* provoked the legislature into an attempt to impeach the judges, and although that attempt did not succeed, the electorate accomplished the same result when at the next election it declined to return all but one of the judges to office.⁵²

For several decades after 1790, however, state courts did succeed in leaving to legislatures the resolution of social conflicts among politically organized or identifiable interest groups. One reason is that during those decades state courts were rarely called upon in constitutional litigation to resolve such conflicts. Many judicial review cases, for example, were of immediate concern only to the rather small number of individuals directly involved; they decided no more than the constitutionality either of private acts granting new trials in pending litigation⁵³ or of such trivial or parochial matters as the right of a sheriff to plead his recapture of an escaped debtor as a defense to a suit by a creditor,⁵⁴ the power of the City of Philadelphia to enact a building code,⁵⁵ and the liability of delinquent clerks to certain statutory penalties.⁵⁶ Other cases, while arising out of politically divisive circumstances, could be disposed of on grounds that were not divisive. A New Jersey case concerning the right of a United States senator simultaneously to hold the office of county clerk⁵⁷ is a prime example: it raised an issue concerning which of two political factions would control an important local office, but the court was able to avoid that issue and deduce its holding from widely accepted principles of republican government. As a result, the case did not permanently favor one faction over the other or involve the judiciary in the decision of fundamental social issues underlying the factional split; it left the factions free to contest those issues in the legislative and electoral forums. The same was true of a series of cases in which state legislatures sought to take alleged property rights from original owners and grant them to others.⁵⁸ The most famous of the taking cases—the *Dartmouth College* case⁵⁹—grew

⁵¹ J. VARNUM, THE CASE, TREVETT AGAINST WEEDEN (1787) (R.I.).

⁵² See GOEBEL, *supra* note 1, at 140-41.

⁵³ *Hamilton v. Hempsted*, 3 Day 332 (Conn. 1809); *Holden v. James*, 11 Mass. 396 (1814); *Merrill v. Sherburne*, 1 N.H. 199 (1818); *Dupy v. Wickwire*, 1 Chip. 237 (Vt. 1814).

⁵⁴ *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811).

⁵⁵ *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799).

⁵⁶ *Caldwell v. Commonwealth*, 2 Ky. (Myers) 129 (1802).

⁵⁷ *State v. Parkhurst*, 9 N.J.L. 427 (Sup. Ct. 1802).

⁵⁸ *Gardner v. Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816); *Den ex dem. Robinson v. Barfield*, 6 N.C. 391 (1818); *Allen's Adm'r v. Peden*, 4 N.C. 442 (1815); *Den ex dem. Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805); *Austin v. Trustees of the Univ. of Pa.*, 1 Yeates 260 (Pa. 1793); *Lindsay v. Commissioners*, 2 Bay 38 (S.C. 1796); *Williams v. Register*, 3A Tenn. 213 (1812).

⁵⁹ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

out of a political controversy that had aroused statewide attention,⁶⁰ but that controversy involved mere questions of patronage and personality unrelated to the legal issues on which the parties argued and the courts disposed of the case. Since American society as yet was unaware of the significance of the legal issues posed by the taking cases, and no organized or identifiable groups or parties had yet formed to urge decision of those issues in any particular way,⁶¹ the outcome of the case seemed nonpolitical. In short, the issue decided in the taking cases—the scope of state power to seize private property—was not yet a politically divisive one, but one for which judges could find answers by reference to broadly shared beliefs about the nature of republican government.

Another large category of cases in which courts did not reconsider legislative policy judgments involved judicial review of statutes altering the composition,⁶² jurisdiction,⁶³ or procedure⁶⁴ of the courts. These statutes had been passed after a campaign by radical reformers during the three decades following the Revolution. The purpose of the campaign was to substitute popular for professional control of the legal system. Nevertheless, the statutes represented a rejection of the radical demands and a conscious policy decision by legislatures not to change the legal system fundamentally.⁶⁵ When their constitutionality was later challenged in the courts, there was no opportunity for reconsideration of this policy decision. All the courts could do was affirm it, for their only options were either to invalidate the statutes and thereby preserve the legal system without any change or to uphold them and thereby acquiesce in the legislature's policy of minor but not fundamental change.

There were, of course, some cases after 1790 in which the courts could have overturned legislation resolving divisive social conflicts between competing political interest groups. But the key fact is that the courts did not invalidate such legislation before 1830. The relation of church and state, for example, was a prime cause of political division in Massachusetts and Virginia in the decades near the turn of the

⁶⁰ See Current, *The Dartmouth College Case*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 15 (J. Garraty ed. 1964).

⁶¹ See WARREN, *supra* note 18, at 487-90. See also L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* 22-23, 62-64 (1948) [hereinafter cited as HARTZ].

⁶² Cohen v. Hoff, 2 Treadway 657, 3 Brev. 500 (S.C. 1814).

⁶³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Enderman v. Ashby*, 2 Ky. (Myers) 53 (1801); *Syndics of Brooks v. Weyman*, 3 Martin 9 (La. 1813); *Whittington v. Polk*, 1 Harr. & J. 236 (Md. 1802); *Jackson v. Griswold*, 5 Johns. 139 (N.Y. 1809); *Rutherford v. M'Faddon* (Ohio 1807), in *OHIO UNREPORTED JUDICIAL DECISIONS—PRIOR TO 1823*, at 71 (E. Pollack ed. 1952); *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808); *White v. Kendrick*, 1 Brev. 469 (S.C. 1805); *Kemper v. Hawkins*, 1 Brock. & H. 20 (Va. 1793).

⁶⁴ *McIlvain v. Holmes*, 2 Ky. (Myers) 317 (1804); *Johnson v. Rowland*, 2 Ky. (Myers) 77 (1801); *State v. —*, 2 N.C. 28 (1794).

⁶⁵ See generally R. ELLIS, *THE JEFFERSONIAN CRISIS* 111-229 (1971).

century. In both states, legislatures after a decade of debate took steps in the direction of disestablishment;⁶⁶ in both, the courts accepted legislative policy judgments and upheld the constitutionality of the disestablishing acts.⁶⁷ Another social conflict that produced political

⁶⁶ See H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 74-151 (1910); P. GOODMAN, THE DEMOCRATIC-REPUBLICANS OF MASSACHUSETTS 162-66 (1964) [hereinafter cited as GOODMAN].

⁶⁷ *Adams v. Howe*, 14 Mass. 340 (1817); *Turpin v. Lockett*, 10 Va. (6 Call.) 113 (1804). *Adams v. Howe* raised an issue, variants of which remain current today, concerning the power of a legislature to overturn a prior constitutional decision of a court. Seven years earlier, in *Barnes v. First Parish in Falmouth*, 6 Mass. 401 (1810), the highest state court had interpreted article 3 of the Declaration of Rights of the Massachusetts Constitution of 1780 which provided "that the people have a right to invest their legislature with power to authorize and require, and the legislature shall from time to time authorize and require the several towns, parishes, precincts, and other bodies corporate and politic, and religious societies, to make suitable provision, at their own expense, for the institution of the publick worship of God, and for the support and maintenance of *publick* protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily." The court had held that the article not only required the collection of religious taxes from adherents of dissenting sects, but also authorized their payment only to incorporated congregations. Since few dissenting congregations either desired incorporation or had the political muscle to obtain it on a regular basis from the legislature, the effect of *Barnes* was to require dissenters to pay taxes to support congregations of the established church, which all were duly incorporated. The dissenters, however, were able to obtain temporary control of the legislature and secure the passage of the Religious Freedom Act of 1811, Mass. Laws of 1811, ch. 6, which among other things sought to overturn *Barnes* by exempting dissenters from taxation and authorizing suits by ministers of unincorporated dissenting congregations to recover taxes which were nonetheless paid by their parishioners. See generally Nelson, *supra* note 6, at 246-66.

Adams involved an attempt to collect a tax from a dissenter claiming exemption under the 1811 Act. The dissenter's claim was met by an argument that the constitution, as previously construed in *Barnes*, required the collection of taxes from dissenters, that the legislative exemption from taxation was inconsistent with the constitution, and that the exemption was therefore void. The court rejected this argument, distinguishing between constitutional provisions that were "merely directory," conferring power upon the legislature to enact laws, 14 Mass. at 347, and provisions that placed "restriction[s] upon the legislature." *Id.* at 346. In the case of the former, the court held that "[t]he legislature is, in the first instance, the judge of its own constitutional powers; and it is only when manifest assumption of authority, or misapprehension of it, shall appear, that the judicial power will refuse to execute it." *Id.* at 345. The court concluded that article 3 of the Declaration of Rights was a "directory" provision and hence that the interpretation given to it in *Barnes* did not bar legislative reinterpretation, particularly since the court had been able in *Barnes* to look only to the "natural and obvious meaning" of the constitutional language, whereas the legislature could subsequently investigate and "grant . . . further relief in particular cases, which in its discretion it may consider as deserving relief." *Id.* at 349-50 (quoting *Barnes*).

The Massachusetts court, however, was not prepared to concede to the legislature similar scope to interpret constitutional provisions restricting legislative power over the individual rights of citizens. As the Massachusetts court recognized, to permit a legislature to dilute rights, which have been specified in a constitution in order to prevent their dilution, would be to subvert the very purpose of a written constitution and of judicial enforcement of it. See *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 222 (1855); *Holden v. James*, 11 Mass. 396, 404 (1814).

The Massachusetts cases appear to offer a sound solution to the enduring problem posed by *Adams*. It would seem that nearly any legislative attempt to narrow the scope of constitutional provisions imposing specific restraints on legislative power for the preservation of individual or minority rights would likely impinge upon those rights. On the other hand, provisions which confer power upon a legislature or withhold power not otherwise granted are only indirectly related to the preservation of specific individual and minority rights. The object of such provisions is to create a framework of government, the details of which can be elaborated in a variety of

divisions in many states arose from squatters placing improvements upon land they were wrongfully occupying;⁶⁸ when the Tennessee legislature adopted an act giving squatters the right to recover the value of their improvements if the true owners sued successfully to recover the land, the Tennessee courts again accepted the legislature's resolution of the conflict and upheld the act's constitutionality.⁶⁹ State courts also upheld other potentially sensitive legislation, such as a Georgia act postponing debt collection suits⁷⁰ and a Pennsylvania act for regulation of the militia.⁷¹ And, on the federal level, where the government's conduct of foreign relations had provided the chief impetus to the creation of party division, the courts again sustained a significant legislative decision—the Embargo Act of 1807.⁷²

Thus, as one surveys the cases between 1790 and 1820 involving claims that state statutes violated state constitutions or that federal statutes violated the Federal Constitution, a persistent pattern emerges. The pattern discloses that courts by 1820 had begun to hold legislation unconstitutional with some frequency, but that their working understanding of the scope of their constitutional activity was sufficiently different from ours that, although we term their activity judicial review, we must not lose sight of the difference. Early nineteenth-century courts, unlike our own, still sought to leave, and in fact succeeded in leaving to legislatures the resolution of conflicts between organized social interest groups. Once a legislature had resolved a conflict in a manner having widespread public support, judges would in practice view the resolution as that of the people at large, even though one or more organized interest groups continued to oppose it, and would give it conclusive effect, at least as long as a finding of inconsistency with the constitution was not plain and unavoidable.

ways consistent with the enjoyment of personal rights. A legislature's exercise of an ambiguous power, particularly to promote individual rights, thus will often have no adverse effect upon the personal rights of which courts are special guardians and can accordingly be viewed by the courts with less suspicion than a legislative attempt to narrow the scope of a restrictive provision. Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *United States v. Carolene Products Co.*, 304 U.S. 144, 148, 152 n.4, 153-54 (1938); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). See generally text accompanying notes 127-40 *infra*. Thus, while Congress should, for example, be the principal judge of its own powers under section 5 of the fourteenth amendment to expand the scope of the equal protection clause, see *Katzenbach v. Morgan*, *supra*, at 653-56, the courts should scrutinize carefully any congressional attempt to deprive citizens of equal protection, which the fifth amendment protects against federal infringement. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁶⁸ See GOODMAN, *supra* note 66, at 125-27, 155-61.

⁶⁹ *Bristoe v. Evans*, 2 Tenn. 341 (1815).

⁷⁰ *Grimball v. Ross*, T. Charit. 175 (Ga. 1808).

⁷¹ *Moore v. Houston*, 3 S. & R. 167 (Pa. 1817).

⁷² *United States v. The William*, 28 F. Cas. 614 (No. 16,700) (D.C.D. Mass. 1808). See J. CHARLES, *THE ORIGINS OF THE AMERICAN PARTY SYSTEM* 116-18, 122 (1956); GOODMAN, *supra* note 66, at 57; Goodman, *The First American Party System*, in *THE AMERICAN PARTY SYSTEMS* 74-76 (W. Chambers & W. Burnham eds. 1967).

Judges of 1820, that is, unlike judges of today,⁷³ did not see judicial review as a mechanism for protecting minority rights against majoritarian infringement. Early judicial review rested upon a perception of political reality that differed sharply from current perceptions. Judges of the early nineteenth century viewed "the people" as a politically homogeneous and cohesive body possessing common political goals and aspirations, not as a congeries of factions and interest groups, each having its own set of goals and aspirations.⁷⁴ The concern of judges in early constitutional cases was with the potentiality of conflict between legislators and their constituents—with the possibility that faithless legislators might betray the trust placed in them by the people. The perceived purpose of judicial review was to protect the people from such possible betrayals, not to interpose obstacles in the path of decisions made by the people's agents in due execution of their trust.

Beginning in the 1820's, however, changes in the types of legislation invalidated by the courts and changes in men's conceptions of law and politics began to transform the nature of judicial review and to undermine its theoretical basis. Of course, courts continued to invalidate legislation having little political significance and arousing little political controversy.⁷⁵ They also continued to proclaim the traditional arguments for judicial review developed near the turn of the century.⁷⁶

⁷³ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Hobson v. Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 310-16 (1972).

⁷⁴ Of course, Americans in the early nineteenth century recognized that factions often existed in the real world of politics. But, on the whole, they viewed such factions as aberrations from the ideal polity. See generally R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* (1969). See also GOODMAN, *supra* note 66, at 6-7, 66-67; Goodman, *The First American Party System*, in *THE AMERICAN PARTY SYSTEMS*, *supra* note 72, at 57. Nor did many Americans at the turn of the nineteenth century discuss judicial review as a mechanism for promoting or protecting the interests of one of several competing factions; indeed, it may be that no Americans perceived judicial review in such terms. Although a number of twentieth-century scholars have argued that some of the Founding Fathers, notably Hamilton, regarded the judiciary as a check upon factions and a bulwark for the protection of minority rights, see, e.g., A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 231 (1960); F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 41 (1955); Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625, 636-37 (1952), these scholars may be distorting history in light of twentieth-century constitutional practices. The accuracy of their views is, in any event, a subject beyond the scope of the current essay and one meriting full treatment on another occasion.

⁷⁵ *Guy v. Hermance*, 5 Cal. 73 (1855) (act barring injunctions against men appointed to sell state land); *Winter v. Jones*, 10 Ga. 190 (1851) (act to sell state lands); *Field v. People*, 3 Ill. 79 (1839) (power of governor to remove secretary of state); *Young v. State Bank*, 4 Ind. 301 (1853) (legislature granted new trial to losing litigant); *Lewis v. Webb*, 3 Me. 326 (1825) (legislature granted new trial); *Crane v. Meginnis*, 1 Gill & Johns. 463 (Md. 1829) (legislative requirement of alimony payments); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185 (1855) (legislature empowered criminal juries to determine the law); *Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. 1822) (using land for turnpike without compensation); *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446 (1862) (act allowing reduced prison terms for good behavior).

⁷⁶ See, e.g., *Beall v. Beall*, 8 Ga. 210, 218 (1850); *Crane v. Meginnis*, 1 Gill & Johns. 463, 472 (Md. 1829); *Morgan v. Buffington*, 21 Mo. 549, 554 (1855); *Bingham v. Miller*, 17 Ohio 445, 446 (1848); *Jones' Heirs v. Perry*, 18 Tenn. 59, 74 (1836).

However, important changes began simultaneously to occur.

One change began around 1830, when courts again started to strike down legislative acts resolving social conflicts between politically organized groups. One case concerned the propriety of government aid to banks. Whether such aid was proper was a most divisive issue in the 1830's,⁷⁷ but when the legislature of Tennessee granted aid to the state bank in the form of special remedies in suits against its defaulting debtors, the state's highest court made no attempt to avoid reconsidering the legislature's policy judgment; it implicitly rejected that judgment and invalidated the act.⁷⁸ Another divisive social issue throughout the South around 1830 was whether to impose stricter legal controls on Negroes,⁷⁹ but again, when one state legislature deprived manumitted slaves of equitable remedies to secure their freedom, the court ignored the legislature's resolution of the policy conflict and held the statute unconstitutional.⁸⁰ Finally, the scope of the eminent domain power for the first time around 1830 became an issue productive of political division,⁸¹ but judges nonetheless continued to declare some legislative takings invalid.⁸²

The trend toward judicial reevaluation of legislative policy determinations grew during the 1840's and 1850's. Three major issues on which organized political groups took stands and which sometimes influenced the outcome of elections during those decades concerned the authority of the states to prohibit the sale, ownership, or consumption of alcoholic beverages;⁸³ the wisdom of granting state or municipal aid to railroads or other public works and appropriating tax money therefor;⁸⁴ and the propriety of giving increased legal protection to property rights of married women.⁸⁵ On all three subjects, courts invalidated legislation in a number of cases.⁸⁶ The relationship of banks and state

⁷⁷ HARTZ, *supra* note 61, at 69-79; A. SCHLESINGER, JR., *THE AGE OF JACKSON* 90-97 (1945) [hereinafter cited as SCHLESINGER].

⁷⁸ *State Bank v. Cooper*, 10 Tenn. 599 (1831).

⁷⁹ C. SYDNOR, *THE DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848*, at 227-29 (1948); see A. TYLER, *FREEDOM'S FERMENT* 513-19 (1944) [hereinafter cited as TYLER].

⁸⁰ *Fisher's Negroes v. Dabbs*, 14 Tenn. 119 (1834).

⁸¹ See WARREN, *supra* note 18, at 29-35.

⁸² See *Charles River Bridge v. Warren Bridge*, 24 Mass. (7 Pick.) 344, 500-06 (1829) (opinion of Putnam, J.); *Taylor v. Porter*, 4 Hill 140, 145-46 (N.Y. 1843); *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9, 63 (N.Y. Ct. Err. 1837) (opinion of Senator Tracy).

⁸³ See HARTZ, *supra* note 61, at 204-19; TYLER, *supra* note 79, at 347-50.

⁸⁴ See HARTZ, *supra* note 61, at 104-09.

⁸⁵ See TYLER, *supra* note 79, at 459-60.

⁸⁶ *Nougues v. Douglass*, 7 Cal. 65 (1857) (erection of state capital); *Beebe v. State*, 6 Ind. 501 (1855) (alcoholic beverages); *Wynehamer v. People*, 13 N.Y. 378 (1856) (alcoholic beverages); *Westervelt v. Gregg*, 12 N.Y. 202 (1854) (married women's rights); *Newell v. People ex rel. Phelps*, 7 N.Y. 9 (1852) (canals); *White v. White*, 5 Barb. 474 (N.Y. Sup. Ct. 1849) (married women's rights); *Holmes v. Holmes*, 4 Barb. 295 (N.Y. Sup. Ct. 1848) (married women's rights).

governments also remained a divisive issue,⁸⁷ and one upon which one state court ignored a legislative policy judgment and held unconstitutional a statute permitting incorporation of banks without legislative approval of individual charters.⁸⁸ In yet another case, a court entered the political thicket when it held invalid a pardon to Thomas Dorr, a leader of a divisive 1842 rebellion that temporarily overthrew the government of Rhode Island.⁸⁹

In all such cases, the courts could readily see "that . . . results of vast moment h[un]g on . . . [their] decision" ⁹⁰ Even when they were passing upon the validity of private acts or of other legislation affecting only a small number of individuals, courts after 1820 were more aware of the public interest in and general significance of their decisions. Thus, the Supreme Court of Vermont noted "the interest which seem[ed] to have been excited in the publick mind" over its prospective invalidation of a private act releasing a debtor from imprisonment,⁹¹ while the Court of Appeals of Maryland recognized the "grave and delicate character . . . [and the importance] as respects the interests involved, and the results to the community" of a case challenging the constitutionality of a legislative revocation of the state university's charter.⁹² Similarly, the Virginia Court of Appeals observed that a case involving the power of a private corporation to raise subscriptions was "of great interest as regards the commonwealth and individual stockholders . . . and on principle . . . [was] deeply interesting to every citizen of the state."⁹³ In short, courts after 1820 found themselves in a situation similar to that in which courts of the 1780's had found themselves: they were being asked to render judgments that would reopen socially divisive controversies that had tentatively been settled in a legislative forum.

Meanwhile a second change—this one in legal theory—served to underscore the political character of judicial review. By 1820 law was no longer seen as a body of fixed and immutable principles, but as "essentially variable, extending and contracting itself according to the condition of the nation, accommodating its flexible character to the manners, habits, and employments of the people";⁹⁴ law, men now thought, "must necessarily vary with the varying tempers of ages and nations."⁹⁵ Moreover, men had come to see that the basis of law was

⁸⁷ See SCHLESINGER, *supra* note 77, at 286-87, 336-39.

⁸⁸ *De Bow v. People*, 1 Denio 9 (N.Y. 1845).

⁸⁹ Opinion of the Supreme Court, 3 R.I. 299 (1854). For a discussion of the "Dorr War," see SCHLESINGER, *supra* note 77, at 411-17.

⁹⁰ *De Bow v. People*, 1 Denio 9, 19 (N.Y. 1845).

⁹¹ *Ward v. Barnard*, 1 Aikens 121, 126 (Vt. 1825).

⁹² *Regents of the Univ. of Md. v. Williams*, 9 Gill & Johns. 365, 383 (Md. 1838).

⁹³ *Goddin v. Crump*, 35 Va. (8 Leigh) 120, 150 (1837).

⁹⁴ *Written and Unwritten Systems of Law*, in 5 AMERICAN JURIST 29 (1831).

⁹⁵ 3 PORTICO 193 (1817).

"[g]eneral expediency, public policy"⁹⁶ and that when courts changed or otherwise made law, they were often "governed . . . by ideas of political expediency."⁹⁷ In short, the courts realized by the 1820's that "[j]ustice is regulated by no certain or fixed standard, so that the ablest and purest minds might sometimes differ with respect to it."⁹⁸ They further came to see that constitutions were not fixed and certain, that a "constitution . . . [often did] not define what . . . [was] meant" by its various provisions,⁹⁹ and that the power of judicial review therefore gave judges a "latitudinarian authority"¹⁰⁰ that was "great and . . . undefined."¹⁰¹ They accordingly grew concerned that decisions invalidating legislative acts would "not be . . . judgment[s] on what was the pre-existing law of the case, but on what it is after we shall have so amended and modified it so as to meet our ideas of justice, policy and wise legislation, by a direct usurpation of legislative powers."¹⁰²

The changes in the types of cases coming to the courts and in the conception of law thus combined to give judicial review a political cast. But even with that cast, review of legislation might still have been justified as insurance against the danger that legislators would betray their trust and violate the constitution, had not a third change occurred. That change was the increasingly democratic nature of the American political system before and during the Age of Jackson.¹⁰³ As the system became more democratic, the prospect of legislative betrayal seemed increasingly remote. In place of conflict and betrayal, courts began after 1820 to assume that legislators were "in direct communication with the people, and responsible to them."¹⁰⁴ American courts had always "conceded that all power is inherent in the people," and the further concession that the "voice" of the people was "heard through the legislatures"¹⁰⁵ led to a conclusion that legislatures were "representatives of the sovereign power" and were therefore possessed of "the right

⁹⁶ F. HILLIARD, *THE ELEMENTS OF LAW* vi (1835).

⁹⁷ W. DUANE, *THE LAW OF NATIONS, INVESTIGATED IN A POPULAR MANNER* 3 (1809).

⁹⁸ *Commonwealth v. M'Closkey*, 2 Rawle 369, 374 (Pa. 1830).

⁹⁹ *Beekman v. Saratoga & S.R.R.*, 3 Paige 45, 49 (N.Y. 1831).

¹⁰⁰ *Commonwealth v. M'Closkey*, 2 Rawle 369, 374 (Pa. 1830).

¹⁰¹ *Cochran v. Van Surlay*, 20 Wend. 365, 382 (N.Y. Ct. Err. 1838).

¹⁰² *Bennett v. Boggs*, 3 F. Cas. 221, 228 (No. 1319) (C.C.D.N.J. 1830). For cases in which courts explicitly took policy into account in deciding constitutional questions, see *Beebe v. State*, 6 Ind. 501, 520 (1855); *Bingham v. Miller*, 17 Ohio 445, 448 (1848); *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446, 449 (1862).

¹⁰³ On the extension of the franchise and the growth of political machines before 1830, see L. BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY* 7-10, 21-28, 33-37 (1965). See generally M. MEYERS, *THE JACKSONIAN PERSUASION* 238-41, 246-49 (1957); SCHLESINGER, *supra* note 77, at 343-44; G. VAN DEUSEN, *THE JACKSONIAN ERA* (1959).

¹⁰⁴ *Dorman v. State*, 34 Ala. 216, 235 (1859).

¹⁰⁵ *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 166 (1834).

to exercise sovereign power,"¹⁰⁶ which courts, in turn, ought not obstruct.

Taken together, these three changes shifted judicial review into a new context. Courts could no longer conceive of review as the mere comparison of a legislative act with a fixed constitutional provision—a comparison involving neither exercise of political discretion nor opposition to the will of the people. Judges now acknowledged that most constitutional provisions were vague and pliable and that when they construed them so as to invalidate legislative acts, they often did so in order to further political, social, or economic doctrines which they endorsed but which the people had rejected in the more democratic legislative process. This new context obviously made judicial review more difficult to justify, for it made plain the doctrine's anti-democratic tendencies. The new context compelled men either to propose abandonment of the doctrine or to articulate other values justifying its anti-democratic nature.

Judge Gibson of Pennsylvania advocated the former course in his 1825 dissenting opinion in *Eakin v. Raub*.¹⁰⁷ Gibson recited all the common arguments. He noted that "repugnance to the constitution is not always self-evident" and that, since men "seldom . . . think exactly alike," "conflicts" in interpreting constitutional provisions would be "inevitable." If the judiciary once entered into considerations of unconstitutionality, he wondered "where shall it stop." For Gibson there were no clear lines, particularly since review of the constitutionality of legislation required judges to make what he labelled "political" as distinguished from "civil" or legal determinations. He further argued that the legislature possessed "pre-eminence" in government; "the power of the legislature," according to Gibson, is "the power of the people, and sovereign as far as it extends." Gibson could simply see no basis for courts to question political decisions made by the people; for him, judicial review denied "a *postulate* in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs."¹⁰⁸

Ultimately, though, in the 1840's and 1850's, Gibson's views were rejected, and judges in their opinions began to articulate new justifications for judicial review. One justification was the weight of precedent: by 1860 courts had held legislation unconstitutional in over one hundred fifty cases. As one state judge observed in 1861, "[t]he right, and the duty of this Court, to give judgment on the constitutional power of the Legislature in making statutes, . . . [has been] established by so many elaborated opinions of this Court, and of the Supreme

¹⁰⁶ *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9, 31 (N.Y. Ct. Err. 1837); *accord, Ex parte Martin*, 13 Ark. 198, 206 (1853); *Wynehamer v. People*, 13 N.Y. 378, 411, 475 (1856).

¹⁰⁷ 12 S. & R. 330, 343 (Pa. 1825).

¹⁰⁸ *Id.* at 346-47, 349-51, 355 (emphasis in the original).

Court of the United States, and of our sister States, as to make a further discussion or citation of authorities a useless attempt at a display of learning.”¹⁰⁹ Courts would “not stop, at [that] late day, to inquire” into “their duty to declare Acts of the Legislature, repugnant to the Constitution, void,” for while “[t]hese grave questions once elicited much discussion,”¹¹⁰ the matter now seemed settled; “[t]he right of courts to declare legislative enactments, in derogation of the constitution, void . . . [had] been too long and steadily exercised in this country to be now doubted or questioned.”¹¹¹ Indeed, even Judge Gibson felt compelled by 1845 to recant his former views, in part because of the weight of authority favoring judicial review and the apparent acquiescence of the people therein.¹¹²

Gibson also came to favor judicial review “from experience of the necessity of the case.”¹¹³ “Experience [had] prove[d]” to Gibson that the constitution was “thoughtlessly but habitually violated.”¹¹⁴ Other judges agreed that “[g]reat wrongs may undoubtedly be perpetrated by legislative bodies,”¹¹⁵ which “from mistaken views of policy” often passed legislation “greatly injurious to the best interests of the State, or . . . oppressive in its operation on one class of citizens.”¹¹⁶ One New York judge, for example, thought “*excessive legislation* . . . [to be] the great legal curse of the age . . . drawing every thing within its grasp,”¹¹⁷ while California and Indiana judges found their “statute book[s] . . . replete with crude and unconstitutional legislation”¹¹⁸ and other “very odious enactment[s].”¹¹⁹

The difficulty with legislatures was that they were too close to the people. It was wrong to think that “no harm . . . [could] result from allowing the people to exercise . . . the law-making power,”¹²⁰ for it was “easy to imagine” how “[i]nterest or passion, or perhaps other dubious influences, often mould[ed] legislation.”¹²¹ When the people, for instance, were “smarting under losses from depreciated bank paper, a feeling might be aroused . . . [to] return a majority to the

¹⁰⁹ *Barnes v. Barnes*, 53 N.C. 366, 369 (1861).

¹¹⁰ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 204 (1848).

¹¹¹ *Wynehamer v. People*, 13 N.Y. 378, 482 (1856).

¹¹² *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

¹¹³ *Id.*

¹¹⁴ *De Chastellux v. Fairchild*, 15 Pa. 18, 20 (1850).

¹¹⁵ *People v. Gallagher*, 4 Mich. 243, 254 (1856).

¹¹⁶ *Hamilton v. St. Louis County Ct.*, 15 Mo. 3, 23 (1851).

¹¹⁷ *People ex rel. Fountain v. Board of Supervisors*, 4 Barb. 64, 72 (N.Y. Sup. Ct. 1848) (emphasis in the original).

¹¹⁸ *People ex rel. Attorney General v. Burbank*, 12 Cal. 378, 385 (1859).

¹¹⁹ *Beebe v. State*, 6 Ind. 501, 527 (1855). For other cases in which judges found legislation ill-considered, see *Mayor of Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 468, 471, 484-85 (1860); *Holmes v. Holmes*, 4 Barb. 295, 298-99 (N.Y. Sup. Ct. 1848).

¹²⁰ *Thorne v. Cramer*, 15 Barb. 112, 117 (N.Y. Sup. Ct. 1851).

¹²¹ *Beebe v. State*, 6 Ind. 501, 527 (1855).

legislature which would declare all banks a nuisance, [and] confiscate their paper and the buildings from which it issued." ¹²² The people, in short, often yielded to "hasty and ill-advised zeal" to "unthinking clamor or partisan importunity," ¹²³ or to erroneous "theories of public good or public necessity . . . so plausible . . . as to command popular majorities." ¹²⁴

It was appropriate, of course, for legislatures to yield to popular majorities; as Madison wrote in 1833, near the end of his life, "the vital principle of republican government is the *lex majoris partis*, the will of the majority." ¹²⁵ By the mid-nineteenth century it was axiomatic that the function of politics was "to secure to the majority of the people that control and influence in every section of the state to which they are justly entitled." ¹²⁶ Yet political majoritarianism raised difficulties. Courts well knew that legislatures concerned only with the interests of the majority would willingly sanction "the sacrifice of individual right" since individual rights were "too remotely connected with the objects and contests of the masses to attract their attention." ¹²⁷ Minorities, that is, could not protect themselves in the legislative process. As one judge explained: ¹²⁸

[W]hen, in the exercise of proper legislative powers, general laws are enacted, which bear or may bear on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?

The judge answered his question by granting to minorities a "refuge . . . in the courts, the only secure place for determining conflicting rights by due course of law," ¹²⁹ without which refuge minorities would

¹²² *Id.* at 521.

¹²³ *Thorne v. Cramer*, 15 Barb. 112, 118 (N.Y. Sup. Ct. 1851).

¹²⁴ *Wynehamer v. People*, 13 N.Y. 378, 387 (1856).

¹²⁵ Quoted in R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 208 (1969).

¹²⁶ M. MEYERS, *THE JACKSONIAN PERSUASION* 252 (1957), quoting N. Carter and W. Stone (reporters), *REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821: ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK*.

¹²⁷ *De Chastellux v. Fairchild*, 15 Pa. 18, 20 (1850).

¹²⁸ *Ervine's Appeal*, 16 Pa. 256, 268 (1851) (Coulter, J.).

¹²⁹ *Id.*

"stand in no better attitude, irrespective of the fundamental principles and maxims of free government, than that of the most abject slaves to the majority."¹³⁰ Indeed, courts feared that, "if the rights of *minorities* . . . [were] not observed, it . . . [would] not be long before the *majorities* . . . [themselves would] be in bondage."¹³¹

By the 1850's, the courts had articulated a new theoretical justification for judicial enforcement of constitutional safeguards. Judges viewed themselves as exercising their "conservative power"¹³² in order to protect the "vital principles" of "free republican governments."¹³³ They believed judicial review was necessary to place "the broad shield of the law over an innocent man . . . entitled to its protection,"¹³⁴ "TO THE END IT MAY BE A GOVERNMENT OF LAWS AND NOT OF MEN."¹³⁵ Indeed, judicial review was needed to protect "that great idea" on which the nation had been founded—the idea of "*liberty regulated by law*."¹³⁶ Most important, judicial review was needed "to secure to weak and unpopular minorities and individuals, equal rights with the majority,"¹³⁷ "to prevent majorities in times of high political excitement from passing partial laws,"¹³⁸ and to protect "minorities against the caprices, recklessness, or prejudices of majorities."¹³⁹ Or, as one Virginia judge had summarized the theory as early as 1837:¹⁴⁰

It must be admitted that at the institution of civil government founded on the rights of all, the will of the majority must prevail over the opinions and interests of the minority: but when such government is established, its great object is to protect the rights of the minority from the tyranny of the majority; a tyranny more inflexible and implacable than the tyranny of a single despot. . . . To effect this relief against the tyranny of majorities, written constitutions were devised by the American people.

By the middle of the nineteenth century, in short, judicial review had become reestablished in the state courts on a new basis—the basis

¹³⁰ *People v. Gallagher*, 4 Mich. 243, 266 (1856).

¹³¹ *Griffith v. Commissioners*, 20 Ohio 609, 623 (1851) (emphasis in the original).

¹³² *De Chastellux v. Fairchild*, 15 Pa. 18, 20 (1850).

¹³³ *Wynehamer v. People*, 13 N.Y. 378, 390 (1856).

¹³⁴ *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 232 (1855).

¹³⁵ *Id.* at 233.

¹³⁶ *Bradley v. Baxter*, 15 Barb. 122, 126 (N.Y. Sup. Ct. 1853).

¹³⁷ *Wally's Heirs v. Kennedy*, 10 Tenn. 554, 557 (1831).

¹³⁸ *Jones' Heirs v. Perry*, 18 Tenn. 59, 71 (1836).

¹³⁹ *Thorne v. Cramer*, 15 Barb. 112, 119 (N.Y. Sup. Ct. 1851); *accord*, *Ex parte Martin*, 13 Ark. 198, 207 (1853).

¹⁴⁰ *Goddin v. Crump*, 35 Va. (8 Leigh) 120, 151 (1837).

on which it would function in *Dred Scott*,¹⁴¹ in the *Legal Tender Cases*, and in numerous twentieth century cases. It had become a means for interest groups lacking control of the legislative process to obtain reconsideration of the legislature's decisions and overturn the legislature's political judgments. It had become a vehicle through which judges could impose their own views of proper economic and social policy on the nation at large and keep the nation loyal to what they thought were the fundamental precepts of American life. Contrary to its original conception, judicial review had become a mechanism for the courts "to protect the people against themselves."¹⁴²

¹⁴¹ The minority that the court protected in *Dred Scott* was, of course, the South as a region, which after 1850 had lost all hope of controlling the federal legislature without the aid of Northern, potentially anti-slavery legislators.

¹⁴² *Beebe v. State*, 6 Ind. 501, 527 (1855). The court in *Beebe* was in fact concerned lest such a result should occur.